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SENATE BILL 219

49TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2009

INTRODUCED BY

Howie Morales

FOR THE REVENUE STABILIZATION AND TAX POLICY COMMITTEE

AN ACT

RELATING TO TAXATION; AMENDING THE CIGARETTE TAX ACT TO EXPAND THE DEFINITION OF CIGARETTE, DECLARE AS CONTRABAND CIGARETTES NOT IN THE DIRECTORY, ALLOW DISTRIBUTORS TO SELL UNSTAMPED CIGARETTES TO OTHER DISTRIBUTORS, LIMIT THE WAIVER OF STAMPING REQUIREMENTS AND ALLOW THE DEPARTMENT TO DENY STAMPS TO VIOLATORS OR TO RENEW LICENSES; AMENDING PENALTIES; AMENDING THE TOBACCO PRODUCTS TAX ACT TO EXEMPT SALES TO CERTAIN TRIBAL GOVERNMENTS AND TO TAX FREE SAMPLES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. Section 7-12-2 NMSA 1978 (being Laws 1971, Chapter 77, Section 2, as amended) is amended to read:

"7-12-2. DEFINITIONS.--As used in the Cigarette Tax Act:

A. "cigarette" means:

(1) any roll of tobacco or any substitute for

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1 tobacco wrapped in paper or in any substance not containing
2 tobacco; [~~or~~]

3 (2) any roll of tobacco that is wrapped in any
4 substance containing tobacco, other than one hundred percent
5 natural leaf tobacco, which, because of its appearance, the
6 type of tobacco used in the filler, its packaging and labeling,
7 or its marketing and advertising, is likely to be offered to,
8 or purchased by, consumers as a cigarette, as described in
9 Paragraph (1) of this subsection [~~and "cigarette" includes~~];

10 (3) bidis and kreteks; or

11 (4) any other roll of tobacco that is defined
12 as a "cigarette" in Subsection D of Section 6-4-12 NMSA 1978;

13 B. "contraband cigarettes" means cigarette packages
14 with counterfeit stamps, counterfeit cigarettes, cigarettes
15 that have false or fraudulent manufacturing labels, cigarettes
16 not sold in packages of five, ten, twenty or twenty-five, [~~and~~]
17 cigarette packages without the tax or tax-exempt stamps
18 required by the Cigarette Tax Act and cigarettes produced by a
19 manufacturer or in a brand family not included in the
20 directory;

21 C. "department" means the taxation and revenue
22 department, the secretary of taxation and revenue or any
23 employee of the department exercising authority lawfully
24 delegated to that employee;

25 D. "directory" means a listing of tobacco product

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1 manufacturers and brand families that is developed, maintained
2 and published by the attorney general under the Tobacco Escrow
3 Fund Act;

4 ~~[D.]~~ E. "distributor" means a person licensed
5 pursuant to the Cigarette Tax Act to sell or distribute
6 cigarettes in New Mexico. "Distributor" does not include:

7 (1) a retailer;

8 (2) a cigarette manufacturer, export warehouse
9 proprietor or importer with a valid permit pursuant to 26
10 U.S.C. 5713, if that person sells cigarettes in New Mexico only
11 to distributors that hold valid licenses under the laws of a
12 state or sells to an export warehouse proprietor or to another
13 manufacturer; or

14 (3) a common or contract carrier transporting
15 cigarettes pursuant to a bill of lading or freight bill, or a
16 person who ships cigarettes through the state by a common or
17 contract carrier pursuant to a bill of lading or freight bill;

18 ~~[E.]~~ F. "license" means a license granted pursuant
19 to the Cigarette Tax Act that authorizes the holder to conduct
20 business as a manufacturer or distributor of cigarettes;

21 ~~[F.]~~ G. "manufacturer" means a person that
22 manufactures, fabricates, assembles, processes or labels a
23 cigarette or that imports from outside the United States,
24 directly or indirectly, a finished cigarette for sale or
25 distribution in the United States;

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1 ~~[G.]~~ H. "master settlement agreement" means the
2 settlement agreement and related documents entered into on
3 November 23, 1998 by the state and leading United States
4 tobacco product manufacturers;

5 ~~[H.]~~ I. "package" means an individual pack, box or
6 other container; "package" does not include a container that
7 itself contains other containers, such as a carton of
8 cigarettes;

9 ~~[I.]~~ J. "retailer" means a person, whether located
10 within or outside of New Mexico, that sells cigarettes at
11 retail to a consumer in New Mexico and the sale is not for
12 resale;

13 ~~[J.]~~ K. "stamp" means an adhesive label issued and
14 authorized by the department to be affixed to cigarette
15 packages for excise tax purposes and upon which is printed a
16 serial number and the words "State of New Mexico" and "tobacco
17 tax";

18 ~~[K.]~~ L. "tax stamp" means a stamp that has a
19 specific cigarette tax value pursuant to the Cigarette Tax Act;
20 and

21 ~~[L.]~~ M. "tax-exempt stamp" means a stamp that
22 indicates a tax-exempt status pursuant to the Cigarette Tax
23 Act."

24 Section 2. Section 7-12-5 NMSA 1978 (being Laws 1971,
25 Chapter 77, Section 5, as amended) is amended to read:

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1 "7-12-5. AFFIXING STAMPS.--

2 A. Except as provided in Section 7-12-6 NMSA 1978,
3 all cigarettes shall be placed in packages or containers to
4 which a stamp shall be affixed. Only a distributor with a
5 valid license issued pursuant to the Cigarette Tax Act may
6 purchase or obtain unaffixed tax-exempt stamps or tax stamps.
7 A distributor shall not sell or provide unaffixed stamps to
8 another distributor, manufacturer, export warehouse proprietor
9 or importer with a valid permit pursuant to 26 U.S.C. 5713 or
10 any other person.

11 B. Stamps shall be affixed by the distributor to
12 each package of cigarettes to be sold or distributed in New
13 Mexico within [~~ten~~] thirty days of receipt of those packages.

14 C. A distributor shall apply stamps only to
15 packages of cigarettes that [~~it~~] the distributor has received
16 directly from another distributor or from a manufacturer or
17 importer of cigarettes that possesses a valid and current
18 permit pursuant to 26 U.S.C. 5713.

19 D. A distributor shall not affix a stamp to a
20 package of cigarettes of a manufacturer or a brand family that
21 is not included in the directory or sell, offer or possess for
22 sale cigarettes of a manufacturer or brand family that is not
23 included in the directory.

24 [~~D.~~] E. Packages shall contain cigarettes in lots
25 of five, ten, twenty or twenty-five.

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1 ~~[E-]~~ F. Unless the requirements of this section are
2 waived pursuant to Section 7-12-6 NMSA 1978, a tax stamp shall
3 be affixed to each package of cigarettes subject to the
4 cigarette tax and a tax-exempt stamp shall be affixed to each
5 package of cigarettes not subject to the cigarette tax pursuant
6 to Section 7-12-4 NMSA 1978.

7 ~~[F-]~~ G. A tax-exempt stamp is not an excise tax
8 stamp for purposes of determining units sold pursuant to
9 Section 6-4-12 NMSA 1978.

10 ~~[G-]~~ H. Stamps shall be affixed inside the
11 boundaries of New Mexico, unless the department has granted a
12 license allowing a person to affix stamps outside New Mexico."

13 Section 3. Section 7-12-6 NMSA 1978 (being Laws 1971,
14 Chapter 77, Section 6, as amended) is amended to read:

15 "7-12-6. WAIVER OF REQUIREMENT THAT STAMPS BE AFFIXED.--
16 The requirement imposed in Section 7-12-5 NMSA 1978 that stamps
17 be affixed to packages or containers of cigarettes is waived if
18 the cigarettes are:

19 A. distributed by a manufacturer pursuant to
20 federal regulations and are exempt from tax pursuant to 26
21 U.S.C. 5704; and

22 B. not subsequently imported into New Mexico."

23 Section 4. Section 7-12-9.1 NMSA 1978 (being Laws 2006,
24 Chapter 91, Section 7) is amended to read:

25 "7-12-9.1. LICENSING--GENERAL LICENSING PROVISIONS.--

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1 A. A person shall not engage in the manufacture or
2 distribution of cigarettes in New Mexico without a license
3 issued by the department.

4 B. The department shall issue or renew a license
5 for a term not to exceed one year.

6 C. The department may charge a license fee of up to
7 one hundred dollars (\$100) for each manufacturer's or
8 distributor's license issued or renewed.

9 D. An application for a license or renewal of a
10 license shall be submitted on a form determined by the
11 department and shall include:

12 (1) the name and address of the applicant and:

13 (a) if the applicant is a firm,
14 partnership or association, the name and address of each of its
15 members; or

16 (b) if the applicant is a corporation,
17 the name and address of each of its officers;

18 (2) the address of the applicant's principal
19 place of business and every location where the applicant's
20 business is conducted; and

21 (3) any other information the department may
22 require.

23 E. The department may issue a distributor's license
24 and a manufacturer's license to the same person.

25 F. Persons licensed as manufacturers or

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1 distributors may sell stamped cigarettes at retail.

2 G. A license may not be granted, maintained or
3 renewed if one or more of the following conditions applies to
4 an applicant:

5 (1) the applicant owes five hundred dollars
6 (\$500) or more in delinquent cigarette taxes;

7 (2) the applicant has had a manufacturer's or
8 distributor's license revoked by the department or any other
9 state within the past two years;

10 (3) the applicant is convicted of a crime
11 related to contraband cigarettes, stolen cigarettes or
12 counterfeit stamps;

13 (4) the applicant is a manufacturer but not a
14 participating manufacturer as defined in Section II(jj) of the
15 master settlement agreement and the applicant is not in
16 compliance with the provisions of Section 6-4-13 NMSA 1978 or
17 the Tobacco Escrow Fund Act; or

18 (5) the applicant is a manufacturer and
19 imports cigarettes into the United States that are in violation
20 of 19 U.S.C. 1681a or manufactures cigarettes that do not
21 comply with the Federal Cigarette Labeling and Advertising Act.

22 H. In addition to a civil or criminal penalty
23 provided by law, upon a finding that a licensee has violated a
24 provision of the Cigarette Tax Act or the Tobacco Escrow Fund
25 Act or a rule adopted pursuant to [~~that~~] either act, the

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1 department may revoke or suspend the license or licenses of the
2 licensee.

3 I. As used in this section, "applicant" includes a
4 person or persons owning, directly or indirectly, in the
5 aggregate, more than ten percent of the ownership interest in
6 the business holding or applying for a license pursuant to the
7 Cigarette Tax Act."

8 Section 5. Section 7-12-9.2 NMSA 1978 (being Laws 2006,
9 Chapter 91, Section 8) is amended to read:

10 "7-12-9.2. DISTRIBUTOR'S LICENSE.--

11 A. A person shall not distribute stamped packages
12 of cigarettes for resale or sell stamped packages of cigarettes
13 at wholesale without first obtaining a distributor's license
14 from the department.

15 B. A person licensed to distribute cigarettes is
16 authorized to:

17 (1) receive unstamped packages of cigarettes
18 from a manufacturer or a distributor;

19 (2) purchase tax stamps and receive tax-exempt
20 stamps from the department;

21 (3) affix tax stamps or tax-exempt stamps to
22 unstamped packages of cigarettes;

23 (4) sell stamped packages of cigarettes to a
24 retailer for resale or to a distributor; and

25 (5) sell unstamped packages of cigarettes to a

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1 person licensed to distribute cigarettes outside of New Mexico
2 or to a distributor."

3 Section 6. Section 7-12-10.1 NMSA 1978 (being Laws 2006,
4 Chapter 91, Section 11) is amended to read:

5 "7-12-10.1. RETENTION OF INVOICES AND RECORDS--INSPECTION
6 BY DEPARTMENT.--

7 A. A manufacturer, [~~or~~] distributor or retailer
8 shall maintain copies of invoices for each of its facilities
9 for every transaction involving a cigarette sale, purchase,
10 transfer, receipt or consignment, except that a retailer need
11 not retain copies of invoices for sales of cigarettes to
12 consumers. An invoice shall show:

13 (1) the names and addresses of all persons
14 involved in the transaction, including the seller, purchaser,
15 consignor and consignee. If a transaction involves an
16 additional facility of the same manufacturer, distributor or
17 retailer, the invoice shall also show the address of the
18 additional facility;

19 (2) the date;

20 (3) the price; and

21 (4) the quantity of each brand of cigarettes
22 involved in each transaction.

23 B. Records required to be maintained pursuant to
24 Subsection A of this section shall be preserved on the premises
25 described in the license in a manner that ensures permanency

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1 and accessibility for inspection at reasonable hours by the
2 department.

3 C. The records required to be maintained pursuant
4 to Subsection A of this section shall be retained for a period
5 of three years from the end of the year in which the
6 transaction occurred, unless otherwise required by law to be
7 retained for a longer period of time.

8 D. The department and the secretary of the United
9 States department of the treasury, or a designee, may inspect
10 the reports and records required pursuant to the Cigarette Tax
11 Act along with any stock of cigarettes in the possession of the
12 manufacturer, distributor or retailer. The department, at its
13 sole discretion, may share those records and reports with law
14 enforcement officials of the federal government, other states
15 and international authorities."

16 Section 7. Section 7-12-13.2 NMSA 1978 (being Laws 2006,
17 Chapter 91, Section 17) is amended to read:

18 "7-12-13.2. CRIMINAL OFFENSES--CRIMINAL PENALTIES--
19 SEIZURE AND DESTRUCTION OF EVIDENCE.--

20 A. Whoever violates a provision of the Cigarette
21 Tax Act or a rule adopted pursuant to that act is guilty of a
22 misdemeanor and shall be sentenced in accordance with the
23 provisions of Section 31-19-1 NMSA 1978.

24 B. Whoever, with intent to defraud, fails to comply
25 with a licensing, reporting or stamping requirement of the

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1 Cigarette Tax Act or with a licensing, reporting or stamping
2 rule adopted pursuant to that act is guilty of a fourth degree
3 felony and upon conviction shall be sentenced pursuant to the
4 provisions of Section 31-18-15 NMSA 1978.

5 C. Whoever packages cigarettes for sale in New
6 Mexico or whoever sells cigarettes in New Mexico, in packages
7 of other than five, ten, twenty or twenty-five cigarettes is:

8 (1) for the first offense, guilty of a
9 misdemeanor and when convicted shall be sentenced pursuant to
10 Section 31-19-1 NMSA 1978; and

11 (2) for the second or subsequent offense,
12 guilty of a fourth degree felony and when convicted shall be
13 sentenced pursuant to Section 31-18-15 NMSA 1978.

14 D. Whoever purchases or otherwise knowingly obtains
15 counterfeit stamps or whoever produces, uses or causes
16 counterfeit stamps to be used is guilty of a fourth degree
17 felony and upon conviction shall be sentenced pursuant to the
18 provisions of Section 31-18-15 NMSA 1978.

19 E. Whoever sells or possesses for the purpose of
20 sale contraband cigarettes is in violation of the Cigarette Tax
21 Act and shall have the product and related equipment seized.
22 If convicted of selling or possessing for sale contraband
23 cigarettes, the person shall be sentenced as follows:

24 (1) a violation with a quantity of fewer than
25 two cartons of contraband cigarettes, or the equivalent, is a

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1 petty misdemeanor and is punishable in accordance with the
2 provisions of Section 31-19-1 NMSA 1978;

3 (2) a first violation with a quantity of two
4 cartons or more of contraband cigarettes, or the equivalent, is
5 a misdemeanor and is punishable in accordance with the
6 provisions of Section 31-19-1 NMSA 1978; and

7 (3) a second or subsequent violation with a
8 quantity of two cartons or more of contraband cigarettes, or
9 the equivalent, is a fourth degree felony and is punishable by
10 a fine not to exceed fifty thousand dollars (\$50,000) or
11 imprisonment for a definite term not to exceed eighteen months,
12 or both, and shall also result in the revocation by the
13 department of the manufacturer's or distributor's license, if
14 any.

15 F. Contraband cigarettes or counterfeit stamps
16 seized by the department or by a law enforcement agency shall
17 be retained as evidence to the extent necessary. Contraband
18 cigarettes or counterfeit stamps no longer needed as evidence
19 shall be destroyed.

20 G. Prosecution for a violation of a provision of
21 this section does not preclude prosecution under other
22 applicable laws."

23 Section 8. Section 7-12-18 NMSA 1978 (being Laws 2006,
24 Chapter 91, Section 14) is amended to read:

25 "7-12-18. REPORTS.--

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1 A. A distributor shall submit periodic reports to
2 the department, in the manner and on the form prescribed by the
3 department. A distributor shall submit a separate report for
4 each of its facilities. The information in the report shall be
5 itemized and shall clearly disclose cigarette brands,
6 quantities and the type of stamp applied to the packages of
7 cigarettes. A report shall include:

8 (1) an inventory of stamped and unstamped
9 packages of cigarettes held for sale or distribution within New
10 Mexico at the beginning of the reporting period;

11 (2) the quantity of stamped packages of
12 cigarettes held for sale or distribution within New Mexico that
13 were received from another person during the reporting period
14 and the name and address of each person from whom each quantity
15 was received;

16 (3) the quantity of New Mexico stamped
17 packages of cigarettes that were distributed or shipped to
18 another distributor or retailer within New Mexico during the
19 reporting period and the name and address of each person to
20 whom each quantity was distributed or shipped;

21 (4) the quantity of unstamped packages of
22 cigarettes that were distributed or shipped to another
23 distributor within New Mexico during the reporting period and
24 the name and address of each person to whom each quantity was
25 distributed or shipped;

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1 [~~(4)~~] (5) the quantity of New Mexico stamped
2 packages of cigarettes that were distributed or shipped to
3 another facility of the same distributor within New Mexico
4 during the reporting period and the address of that facility;

5 [~~(5)~~] (6) the quantity of stamped cigarette
6 packages that were distributed or shipped within New Mexico to
7 an Indian nation, tribe or pueblo or to a person located on the
8 land of an Indian nation, tribe or pueblo or to
9 instrumentalities of the federal government during the
10 reporting period and the name and address of each person,
11 entity or instrumentality to whom each quantity was distributed
12 or shipped;

13 [~~(6)~~] (7) an inventory of stamped and
14 unstamped packages of cigarettes held for sale or distribution
15 within New Mexico at the end of the reporting period;

16 [~~(7)~~] (8) an inventory of stamped and
17 unstamped packages of cigarettes for sale or distribution
18 outside of New Mexico at the beginning of the reporting period;

19 [~~(8)~~] (9) the quantity of packages of
20 cigarettes held for sale or distribution outside of New Mexico
21 that were received from another person during the reporting
22 period and the name and address of each person from whom each
23 quantity was received;

24 [~~(9)~~] (10) the quantity of packages of
25 cigarettes that were distributed or shipped outside New Mexico

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1 during the reporting period;

2 ~~[(10)]~~ (11) an inventory of packages of
3 cigarettes held for sale or distribution outside of New Mexico
4 at the end of the reporting period;

5 ~~[(11)]~~ (12) the number of each type of stamp
6 on hand at the beginning of the reporting period;

7 ~~[(12)]~~ (13) the number of each type of stamp
8 purchased or received during the reporting period;

9 ~~[(13)]~~ (14) the number of each type of stamp
10 applied during the reporting period; and

11 ~~[(14)]~~ (15) the number of each type of stamp
12 on hand at the end of the reporting period.

13 B. A manufacturer shall submit periodic reports in
14 the manner and on the form prescribed by the department. The
15 information in the report shall be itemized to clearly disclose
16 cigarette brands and quantities. The reports shall be provided
17 separately with respect to each of the facilities operated by
18 the manufacturer. A report shall contain the quantity of
19 packages of cigarettes that were distributed or shipped:

20 (1) to a manufacturer, distributor or retailer
21 within New Mexico during the reporting period and the name and
22 address of each person to whom each quantity was distributed or
23 shipped;

24 (2) to another facility within New Mexico of
25 the same manufacturer during the reporting period and the

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1 address of the facility; and

2 (3) within New Mexico to an Indian nation,
3 tribe or pueblo or to a person located on the land of an Indian
4 nation, tribe or pueblo or to instrumentalities of the federal
5 government during the reporting period and the name and address
6 of each person, entity or instrumentality to whom each quantity
7 was distributed or shipped.

8 C. The department may require additional
9 information to be submitted. The department shall establish
10 the reporting period, which shall be no longer than three
11 calendar months and no shorter than one calendar month."

12 Section 9. Section 7-12A-2 NMSA 1978 (being Laws 1986,
13 Chapter 112, Section 3, as amended) is amended to read:

14 "7-12A-2. DEFINITIONS.--As used in the Tobacco Products
15 Tax Act:

16 A. "department" means the taxation and revenue
17 department, the secretary or any employee of the department
18 exercising authority lawfully delegated to that employee by the
19 secretary;

20 B. "distribute" means to sell or to give;

21 [~~B.~~] C. "engaging in business" means carrying on or
22 causing to be carried on any activity with the purpose of
23 direct or indirect benefit;

24 [~~C.~~] D. "first purchaser" means a person engaging
25 in business in New Mexico who manufactures tobacco products or

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1 who purchases or receives on consignment tobacco products from
2 any person outside of New Mexico, which tobacco products are to
3 be ~~[sold]~~ distributed in New Mexico in the ordinary course of
4 business;

5 ~~[D-]~~ E. "person" means any individual, estate,
6 trust, receiver, cooperative association, club, corporation,
7 company, firm, partnership, joint venture, syndicate, limited
8 liability company, limited liability partnership, other
9 association or gas, water or electric utility owned or operated
10 by a county or municipality or other entity ~~[or]~~ of the state
11 ~~[of New Mexico or any political subdivision thereof]~~; "person"
12 also means, to the extent permitted by law, a federal, state or
13 other governmental unit or subdivision or an agency, department
14 or instrumentality;

15 ~~[E-]~~ F. "product value" means the amount paid, net
16 of any discounts taken and allowed, for tobacco products or, in
17 the case of tobacco products received on consignment, the value
18 of the tobacco products received or, in the case of tobacco
19 products manufactured and sold in New Mexico, the proceeds from
20 the sale by the manufacturer of the tobacco products; and

21 ~~[F-]~~ G. "tobacco product" means any product, other
22 than cigarettes, made from or containing tobacco."

23 Section 10. Section 7-12A-3 NMSA 1978 (being Laws 1986,
24 Chapter 112, Section 4, as amended) is amended to read:

25 "7-12A-3. IMPOSITION AND RATE OF TAX--DENOMINATION AS

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1 "TOBACCO PRODUCTS TAX"--DATE PAYMENT OF TAX DUE.--

2 A. For the manufacture or acquisition of tobacco
3 products in New Mexico [~~for sale~~] to be distributed in the
4 ordinary course of business and for the consumption of tobacco
5 products in New Mexico, there is imposed an excise tax at the
6 rate of twenty-five percent of the product value of the tobacco
7 products.

8 B. The tax imposed by Subsection A of this section
9 may be referred to as the "tobacco products tax".

10 C. The tobacco products tax shall be paid by the
11 first purchaser on or before the twenty-fifth day of the month
12 following the month in which the taxable event occurs."

13 Section 11. Section 7-12A-4 NMSA 1978 (being Laws 1986,
14 Chapter 112, Section 5) is amended to read:

15 "7-12A-4. EXEMPTION--TOBACCO PRODUCTS TAX.--

16 A. Exempted from the tobacco products tax is the
17 product value of tobacco products sold:

18 (1) to or by the United States or any agency
19 or instrumentality thereof; [~~or~~]

20 (2) to the governing body or any enrolled
21 tribal member licensed by the governing body of an Indian
22 nation, tribe or pueblo to be distributed on the reservation or
23 pueblo grant of that Indian nation, tribe or pueblo; or

24 (3) the state of New Mexico or any political
25 subdivision thereof.

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